No. 152.

Brief of Stewart & Ralston for

Filed Oct. 16, 1899

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 152.

DE LAMAR'S NEVADA GOLD MINING COMPANY,
PLAINTIFF IN ERROR,

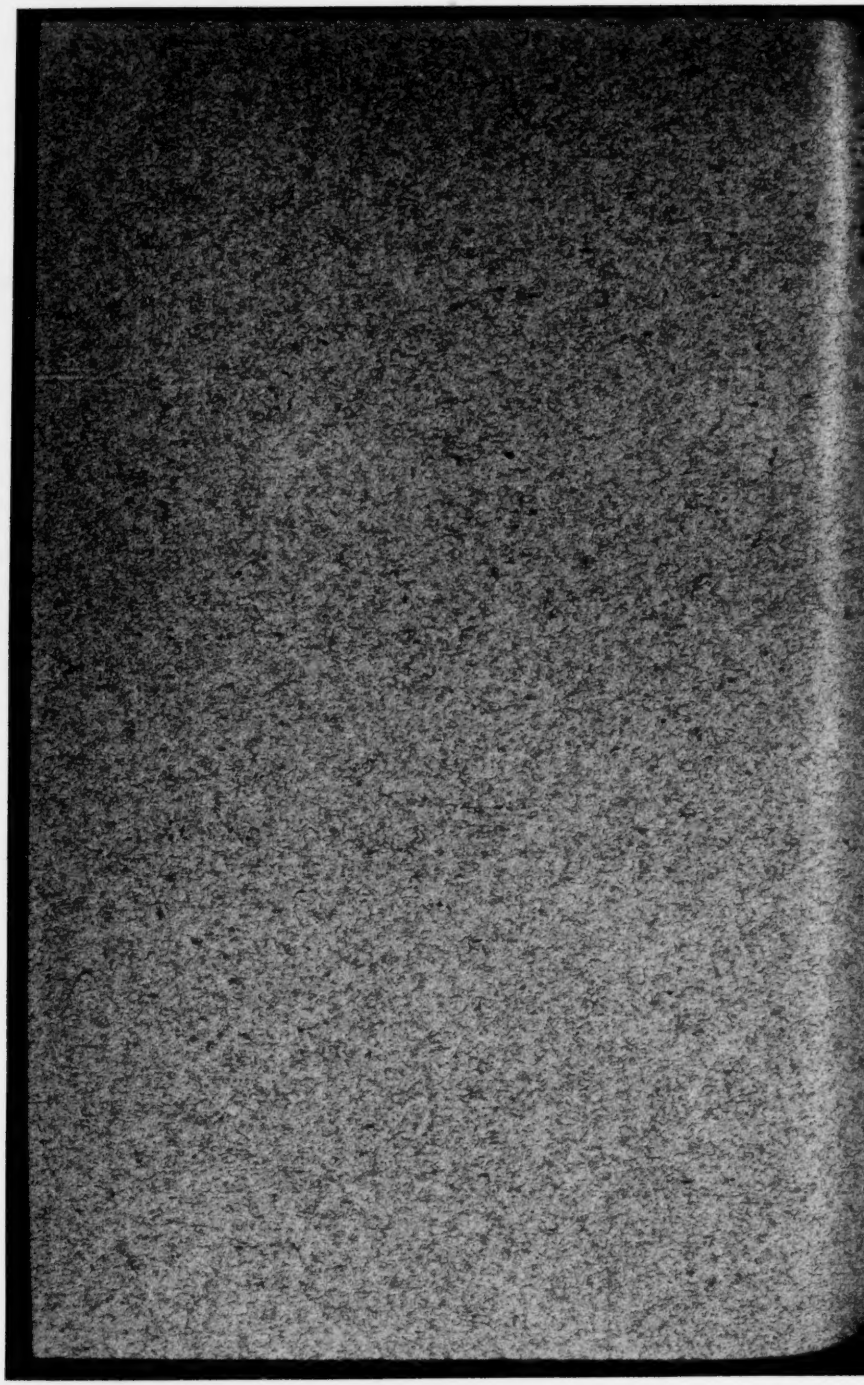
vs.

JAMES NESBITT, DEFENDANT IN ERROR.

Brief on Motion to Dismiss for Want of Federal Question and Also Upon the Merits.

WILLIAM M. STEWART,
JACKSON H. RALSTON,
Attorneys for Plaintiff in Error.

LAW REPORTER PRINT.



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STATEMENT OF FACTS.

The defendant in error in this case, James Nesbitt, was plaintiff in the original suit, which was brought against William M. Davidson, as defendant, and in which Nesbitt sought a decree quieting the title in himself and his cotenants (who were not named), to the Fraction Mine and Mining Claim, and, also, that the defendant was not entitled to a United States patent to a conflicting location, known as The Sleeper Mine and Mining Claim. The plaintiff claimed an undivided three-eighths interest in the Fraction. A decree in favor of the plaintiff was awarded by the District Court of Lincoln County, Nevada, and on appeal to the Supreme Court of Nevada, this decree was affirmed.

The facts as disclosed by the record, are as follows:

On or about May 15, 1892, W. L. De Beque, H. Stevens and

A. Borth located the Fraction Mine, and performed the acts necessary to make the location valid. They did no assessment work, directly or indirectly, upon the land in the years 1893 and 1894, and the first work after 1892 performed by anybody purporting to represent any of the locators named above, was in December, 1895, and in the early part of 1896. (Folio 60.)

On May 12, 1893, James and George Nesbitt, partners, under the name of J. Nesbitt & Brother, filed two suits, one against H. Stevens, and the other against W. L. De Beque, such suits being filed in the justice's court for Pioche Township, Lincoln County, Nevada, and, the complaint being verified (folios 121, 122, 149 and 150), summonses were immediately issued against the respective defendants (folios 124, 125, 152 and 153), returnable on July 10, 1893. On the same day, May 12, 1893, attachments were issued against the respective defendants and delivered to a special deputy for service (folios 127, 128, 155, 156 and 157). On the following day, May 13, 1893, affidavits, as foundation for service by publication, were sworn to and filed in the justice's court (folios 129, 130, 158 and 159). The order of publication was duly published, and without any judgment, so far as shown by the Record, having been entered up against either of the defendants and without issuance of any execution, except as shown by recitals on folios 139 and 166, a special deputy undertook to sell on August 11, 1893, two undivided halves of the Fraction Mine to J. Nesbitt & Brother, giving the purchasers on that date certificates of sales, as will appear by reference to folios 139, 140, 166 and 167 of the Record. The period of redemption under valid certificates of the sort above mentioned was six months, and in this case expired on February 11, 1894. Deeds for the property above described were, on February 19, 1894, executed by J. A. Denton, special deputy, to J. Nesbitt & Brother.

No work having been done in the Fraction Mine during

the year 1893, the defendant in error and his brother, on December 26, 1893, filed notice of intention under the Act of Congress approved November 3, 1893, (folio 175), and no work occurring under the claim for the Fraction Mine during the year 1894, the same parties, on December 22, 1894, filed a similar notice, under the provisions of the act approved July 18, 1894, (folio 178).

On January 1, 1895, William M. Davidson and Joseph Murphy located the Sleeper Mine, complying with all the United States statutes in connection with such location; Murphy subsequently conveying his interest to Davidson, the defendant in the original suit.

During the progress of the present litigation, Davidson conveyed his title to the plaintiff in error (folio 37), who was substituted as party defendant in his place. This quit claim covered the ground embraced in the Fraction claim. All assessment work was done by Davidson and Murphy upon the claim in the year 1895, and, in fact, no one, except Davidson, exercised any degree of possession over any portion of the property until December of that year. In 1896 the assessment work was again performed by Davidson, or at his instance.

Upon the foregoing facts, the plaintiff below claimed that the title to the property in controversy became vested one-fourth in A. Borth (the interest shown by his original location notice, [folio 184]), three-eighths in James Nesbitt, and three-eighths in George Nesbitt, while the defendant below claims the entire interest in the property by virtue of the Davidson and Murphy location.

ASSIGNMENTS OF ERROR.

1. That the Nevada Supreme Court erred in its ruling that A. Borth and the Nesbitt brothers, under the evidence, mutually recognized each other as co-owners of said mining claim,

and that said notices filed by Nesbitt brothers in 1893 and 1894 were filed by them on behalf of, and in protection of, the rights of both said Nesbitt brothers and A. Borth, and were effective to protect the rights of Nesbitt brothers and A. Borth in and to said mining claim, and so save the same from relocation.

2. That said court erred in considering any and all testimony in the Record showing or tending to show that A. Borth and the Nesbitt brothers mutually recognized each other as co-owners in said mining claim, and that said notices filed in 1893 and 1894 were filed by Nesbitt brothers at the request of A. Borth, and upon consultation and agreement between said Nesbitt brothers and A. Borth to protect the rights of all, the introduction of all and every part of said evidence having been properly objected to by plaintiff in error, as appears by the Record in this cause.

3. The said court erred in deciding that in consequence of said notices so filed by Nesbitt brothers in 1893 and 1894 said mine was not forfeited or subject to relocation when the location of the Sleeper Mine was made in January, 1895.

4. That said court erred in ruling that the location of the Sleeper Mine was invalid in so far as it covered the Fraction mining claim.

5. That the said court erred in its construction of the special acts of 1893 and 1894 as to who are rightfully entitled to be considered as "claimants" under said acts, and in ruling that said defendant in error or Nesbitt brothers had such an interest in said Fraction mining claim as to entitle them to save said claim from forfeiture and relocation under the provisions of said special acts.

6. That the said court erred in considering the certificates of sale or the deeds to said Fraction mining claim issued by the officer to Nesbitt brothers, or either of them as constituting any interest in or claim upon said mining claim in favor of said Nesbitt brothers, or either of them.

7. That the said court erred in affirming the judgment of

the district court in this cause quieting the title of said Fraction mining claim in said Nesbitt brothers or A. Borth.

8. That the said court erred in refusing to quiet the title of said Fraction mining claim in plaintiff in error, and in not decreeing the plaintiff in error to be the owner and entitled to the possession of said claim.

ARGUMENT.

It is contended on behalf of the defendant in error that no Federal question is involved in the pending case, and that, therefore, the writ of error should be dismissed. A careful perusal of the brief filed on behalf of the defendant in error, discloses the fact that a Federal question is involved, the brief stating that—

> "the only statute of the United States, the construction of which was brought to the attention of the State courts, was the Act of Congress of July 18, 1894." And again, "the validity of the statute was upheld by the State court." (Brief, p. 5).

A Federal question was plainly involved. The opinion and opinion on rehearing of the Supreme Court of Nevada discuss the application of the statutes involved. The plaintiff below claimed that he had, by virtue of the provisions of the United States statutes, and as against all the world, except the United States, a right to the possession of the land in controversy. The defendant claimed that because of the want of title on the part of the plaintiff below he had no right to any relief at the hands of the court, and that because of such want of title he was not a claimant within the meaning of the two statutes to which reference was made in the statement of facts.

Our first contention therefore, is, that there was no such title in the Nesbitts as would justify them, or either of them, in filing the original suit in this case. Their only title was

based upon certain attachment proceedings, which a careful review of the foregoing statement and additional facts to be now mentioned will prove to have been entirely invalid. It will be noted that the original summons was issued May 12, 1893, and was made returnable July 10, 1893. On the day of its issuance the Record failed to disclose in any manner that the defendants were non-residents. It could only be regarded in the light of an original summons before a justice, and as such should have been made returnable "in not less than two, nor more than ten, days after its date."

Section 3539, General Statutes of Nevada.

By Section 3146 of the same statutes, when an attachment is to be issued against a non-resident, there must first be filed an affidavit by or on behalf of the plaintiff showing—

> "First: that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims) upon a contract for the direct payment of money, and that such contract was made, or is, by the terms thereof, payable in this State, and that the payment of the same has not been secured by any mortgage, lien or pledge upon real or personal property situate or being in this State, or, if so secured, that said security has been rendered nugatory by the act of the defendant; or, Second: That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness as near as may be over and above all legal set-offs or counterclaims), and that the defendant is a non-resident of the State. Third: That the sum for which the attachment is asked is an actual *bona fide* existing debt due and owing from the defendant to the plaintiff, and that the attachment is not sought, and the action is not prosecuted, to hinder, delay or defraud any creditor of the defendant."

Not one of these requirements was met in any way.

No affidavit whatever was filed before the issuance of the attachment on May 12, 1893, and the only one ever filed

was presented the following day for the obtainment of an order of publication. The attachment was therefore void.

Furthermore, when it is desired to obtain service by publication, it is necessary that the plaintiff shall fulfill the requirements of Section 3052, providing that—

> "when the person on whom the service is to be made resides out of the State, or has departed from the State, or can not, after due diligence, be found within the State, or conceals himself to avoid the service of summons, or, being a corporation, or joint stock association, can not be served as provided in Section twenty-nine (3051), and the fact shall appear by affidavit to the satisfaction of the court or a judge thereof, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons."

In the present case affidavits were filed to the effect that the defendants had departed from the State of Nevada and could not, after due diligence, be found therein, and that service of summons upon them in said action could not be made, except by the publication thereof (folios 129 and 158). It will be observed that these affidavits do not show that a cause of action existed against the defendants in respect to whom the service was to be made, and the complaints were not made part of the affidavits, although an attempt to supply the deficiencies was apparently made by the justice, who recited, in his orders permitting publication, that "from a consideration of the complaint, it appears that a cause of action exists." We respectfully submit that the action of the justice was manifestly erroneous, and that the fact should have been made to appear to his satisfaction, in accordance with the section under consideration, by affidavit. Certainly the case, in this respect, absolutely departs from statutory directions.

We need not argue to the court the necessity of an absolute compliance with statutory requirements in a case of this sort, involving, as it does, the technical features attaching to attachment suits and to service of publication.

As showing the absolute invalidity of the proceedings herein, for the reasons above pointed out, we refer to—

Roy *vs.* Whitford, 9 Nev. 370.
Little *vs.* Currie, 5 Nev. 90.
Ricketson *vs.* Richardson, 26 Cal. 149.
Braly *vs.* Seaman, 30 Cal. 610.
Forbes *vs.* Hyde, 31 Cal. 342.
Victor M. & M. Co. *vs.* Justice's Court, 18 Nev. 21.

Where a justice's court acts without jurisdiction, its judgment is a nullity, not voidable, but void.

12 Am. & Eng. Ency. Law, 400.

Consideration of the foregoing demonstrates clearly the fact that no title whatever to the Fraction Mine was conveyed to James and George Nesbitt by reason of the above recited proceedings, and, in fact, this conclusion was apparently admitted by the trial court, and also by the Supreme Court of the State of Nevada (fols. 78, 191). It was, however, contended by both courts that although the proceedings might be insufficient to confer title, the certificates of sale and deeds were nevertheless sufficient to constitute color of title, and that the Nesbitts, having color of title, were in position to file the declarations of intention before alluded to.

We contend that, in the first place, the Nesbitts had no color of title under any proper interpretation of the law when the first declaration of intention was filed. On that date, December 26, 1893, all that they possessed was the certificates of the special deputy, showing that the sales had taken place under an execution; and the title had not yet ripened because of the right of the defendants in execution to

redeem their property. The title, therefore, was still in De Beque and Stevens.

The certificates were insufficient as color of title for the further reason that they did not, on their face, purport to convey title. An analogous case to this is that of a certificate of purchase at a tax sale, which for the reasons above given has been repeatedly held not to constitute color of title.

Bride *vs.* Watt, 23 Ill. 507.
Dickenson *vs.* Breeden, 30 Ill. 279.
McKeighan *vs.* Hopkins, 14 Neb. 361.

Similarly, a pre-emption certificate and claim, while possibly sufficient to maintain trespass to try title, is not until perfected title or color of title.

Buford *vs.* Bostick, 58 Texas, 63.
Clark *vs.* Smith, 59 Texas, 275.

If, therefore, the Nesbitts never having had possession or exercised any acts of ownership over the land prior to January 1, 1894, and not having had before that time color of title to the land, filed, as they did, on December 26, 1893, a certificate of intention, surely such act upon their part must have been a mere nullity. In its filing, as will appear by reference to the Record, they acted upon their own behalf and not on the behalf of Borth or anybody having any record interest in the land, (folio 175).

In view of the foregoing, what importance shall we attach to the declaration of intention filed December 22, 1894 (folio 178)? None, whatever, as it seems to us. The statute was made for the benefit of the claimant or claimants of any mining location. During the year 1894, the Nesbitts were not claimants within the meaning of this act. Their supposed title was based upon the title of Stevens and De Beque, who never filed any notice of intention in 1893, or performed any labor in that year, and whose rights had

therefore lapsed. The Nesbitts themselves had performed no labor in 1893, and their only title to consider themselves claimants was based upon their possession of a deed executed in 1894, purporting to be based upon mining rights which had already been lost.

We understand by the term "claimant" a man who has put himself in a position to make a legal, or apparently legal, claim to land; not one who, so far as the title is concerned, appears to be a mere volunteer. A mining claimant under the United States mining laws is evidently a man who has located a mining claim or who holds under someone who had made such a location. In 1894 the Nesbitts had not located any mining claim, nor did they, so far as the Fraction Mine was concerned, succeed to the rights of anyone who had made such a location, the original locators having failed to maintain their position. The court below manifestly erred in treating the Nesbitts as mining claimants within the meaning of the statutes of Congress, and in this respect failed, as we respectfully submit, in the proper interpretation of the mining laws of the United States.

But even if the certificate of sale and the deed to the Nesbitts had constituted color of title, we must, nevertheless, earnestly insist that such title does not meet the requirements of the present case. Color of title serves to show that the person having it is claiming title, the kind of title he claims, and also to fix the boundaries of the claim, but it does not constitute title in itself. The only advantage of having color of title is in connection with some actual possession, and in this case no such possession was had in 1893, 1894 or 1895 (until the middle of December), so far as the Record discloses, by or on behalf of the supposed Nesbitt interest.

The record of the deeds to the Nesbitt brothers did not constitute notice to anybody of the existence of a title in them, for, as we have shown, the deeds were based upon certain invalid proceedings. So far as the Record discloses,

when the deeds to the Nesbitts were placed of record, the title, if any, to the Fraction Mine was outstanding in De Beque, Stevens and Borth. The recordation of deeds based upon invalid sales did not change the condition of the title. There was nothing in the Nesbitts' claim upon which they could have predicated a title, or hoped to recover in any possessory action. As against Stevens and De Beque, their title could have been instantly quieted. As against the rest of the world, they did not hold possession of the land, nor had they the ability to recover it in any imaginable suit.

If, therefore, as we insist, the title to these premises was, in the fall of 1893, in Stevens, De Beque and Borth, the question arises, did they maintain their title in conformity with the United States statutes? No one of them filed a certificate of intention.

Nesbitt claims to have filed a certificate on behalf of Borth, and Borth so testifies. Laying aside the intrinsic improbabilities of the statement of Borth (as to which we only need refer to the fact that he says his agreement, that Nesbitt should on his behalf file a declaration of intention, was made in September, 1893, two months before the act of Congress allowing this course was passed, [Folio 81]), could such a certificate have been filed by Nesbitt without disclosing Borth's name? We submit not. In no possible way, even by void proceedings, was any apparent title of record vested in the Nesbitts until the deeds to them were filed, and this did not occur until September 14, 1896. True it was that on August 18, 1893, the certificates of sale were placed of record, but these certificates, as we have above shown, did not convey or purport to convey title, but expressly provided that the real estate was subject to redemption within six months; and, furthermore, an examination of the proceedings upon which they were based would have disclosed the fact that the title still remained in De Beque and Stevens.

The court below predicated the rights of the Nesbitt brothers upon the consent alleged to have been given by

Borth and to which we have already alluded. The opinion is expressed that—

> "The Fraction Mine being represented by one of the locators, A. Borth, and said Nesbitt Bros. having had said notices recorded, in pursuance of said agreement and at the instance of said Borth as well as of themselves, and under the honest belief of all three that the Nesbitt Bros. had legally acquired all the right, title, and interest of the other two locators by virtue of said judgments and sales made thereunder, we are of opinion that said mine had not been forfeited nor subject to relocation when the location of the Sleeper Mine was made, and therefore that the location of the Sleeper M ne was and is invalid in so far as it covers the Fraction Mining Claim." (Folio 193.)

It seems to us that the foregoing involves several propositions decidedly unusual, to say the least. The first is, virtually, that the relation of tenant in common can be created as against the world by a mere act of recognition. This involves the theory that De Beque and Stevens must have lost their title because their cotenant recognized some other man as having succeeded to it. We do not believe that title to land can be transferred in any such vague manner as this.

A further implication of the opinion is that an agreement between parties, of which the public has no knowledge, can take the place of record notice required by law in order to effectuate the transfer of title. It would seem to us that such an idea would defeat all necessity for the use of public records and leave the public at the absolute mercy of any claimant to any interest in the land.

But if this agreement were had, and if it had been possible to vest title by such agreement, it next appears that the Nesbitts, having no title of record, undertook in 1893 to file a notice of intention to hold the Fraction Mining Claim, without mentioning Borth's name in any manner whatever,

nor, in fact, was Borth's name mentioned in the certificate filed in 1894. In order, therefore, to sustain any title in the Nesbitts, or in Borth, we are compelled to absolutely disregard all laws calling for notice by record. There certainly was not any notice of record to show that Borth filed such a certificate, nor was there any notice of record that such certificate was filed by his consent. Surely, to leave the gaining or the losing of a title to parol evidence of this character would be contrary to our entire public policy.

As a matter of convenience we attach to this brief copies of the acts of Congress called in question in this case.

In view of the foregoing we respectfully submit that the judgment of the Nevada court should be reversed.

WILLIAM M. STEWART,
JACKSON H. RALSTON,
Attorneys for Plaintiff in Error.

APPENDIX.

AN ACT to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, relating to mining claims. (28 Stats. at L. 6.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-three so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-three: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they, in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

This act shall take effect from and after its passage.

Approved Nov. 3, 1893.

AN ACT to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims. (28 Stats. at L. 114.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the

provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-four, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-four: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed, on or before December thirty-first, eighteen hundred and ninety-four, a notice that he or they in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

SEC. 2. That this act shall take effect from and after its passage.

Approved July 18, 1894.

No. 152.
Brf. of Stewart & Ralston for Pltf.

Office Supreme Court U. S.
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JAMES H. McKENNEY, Clerk

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The facts as disclosed by the Record are as follows

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Upon the foregoing facts the plaintiff below claimed that the title to the property in controversy became vested, one-fourth in A. Borth (the interest shown by his original location notice [folio 184]), three-eighths in James Nesbitt and three-eighths in George Nesbitt, while the defendant below claims the entire interest in the property by virtue of the Davidson and Murphy location.

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1. That the Nevada Supreme Court erred in its ruling that A. Borth and the Nesbitt brothers, under the evidence, mutually recognized each other as co-owners of said mining claim,

and that said notices filed by Nesbitt brothers in 1893 and 1894 were filed by them on behalf of, and in protection of, the rights of both said Nesbitt brothers and A. Borth, and were effective to protect the rights of Nesbitt brothers and A. Borth in and to said mining claim, and so save the same from relocation.

2. That said court erred in considering any and all testimony in the Record showing or tending to show that A. Borth and the Nesbitt brothers mutually recognized each other as co-owners in said mining claim, and that said notices filed in 1893 and 1894 were filed by Nesbitt brothers at the request of A. Borth, and upon consultation and agreement between said Nesbitt brothers and A. Borth to protect the rights of all, the introduction of all and every part of said evidence having been properly objected to by plaintiff in error, as appears by the Record in this cause.

3. The said court erred in deciding that in consequence of said notices so filed by Nesbitt brothers in 1893 and 1894 said mine was not forfeited or subject to relocation when the location of the Sleeper Mine was made in January, 1895.

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5. That the said court erred in its construction of the special acts of 1893 and 1894 as to who are rightfully entitled to be considered as "claimants" under said acts, and in ruling that said defendant in error or Nesbitt brothers had such an interest in said Fraction mining claim as to entitle them to save said claim from forfeiture and relocation under the provisions of said special acts.

6. That the said court erred in considering the certificates of sale or the deeds to said Fraction mining claim issued by the officer to Nesbitt brothers, or either of them, as constituting any interest in or claim upon said mining claim in favor of said Nesbitt brothers, or either of them.

7. That the said court erred in affirming the judgment of

the district court in this cause, quieting the title of said Fraction mining claim in said Nesbitt brothers or A. Borth.

8. That the said court erred in refusing to quiet the title of said Fraction mining claim in plaintiff in error, and in not decreeing the plaintiff in error to be the owner and entitled to the possession of said claim.

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It is contended on behalf of the defendant in error that no Federal question is involved in the pending case, and that, therefore, the writ of error should be dismissed. A careful perusal of the brief filed on behalf of the defendant in error, discloses the fact that a Federal question is involved, the brief stating that—

> "the only statute of the United States, the construction of which was brought to the attention of the State courts, was the Act of Congress of July 18, 1894." And again, "the validity of the statute was upheld by the State court." (Brief, p. 5).

A Federal question was plainly involved. The opinion and opinion on rehearing of the Supreme Court of Nevada discuss the application of the statutes involved. The plaintiff below claimed that he had, by virtue of the provisions of the United States statutes, and as against all the world, except the United States, a right to the possession of the land in controversy. The defendant claimed that because of the want of title on the part of the plaintiff below he had no right to any relief at the hands of the court, and that because of such want of title he was not a claimant within the meaning of the two statutes to which reference was made in the statement of facts.

Our first contention, therefore, is, that there was no such title in the Nesbitts as would justify them, or either of them, in filing the original suit in this case. Their only title was

based upon certain attachment proceedings which a careful review of the foregoing statement and additional facts that we now mention will prove to have been entirely invalid. It will be noted that the original summons was issued May 12, 1893, and was made returnable July 10, 1893. On the day of its issuance the Record failed to disclose in any manner that the defendants were non-residents. It could only be regarded in the light of an original summons before a justice, and as such should have been made returnable "in not less than two nor more than ten days after its date."

Section 3539, General Statutes of Nevada.

Sections 3145 and 3146 of the General Statutes of Nevada, as amended February 14, 1887, in Statutes of Nevada, 1887, page 55 (applicable also to justices' courts), provide that the clerk of the court shall issue the writ of attachment upon receiving and filing an affidavit by or on behalf of the plaintiff, showing the nature of the plaintiff's claim, that same is just; the amount which the affiant believes the plaintiff is entitled to recover, and the existence of any one of the following circumstances or grounds of attachment:

> "First. In an action upon contract for the direct payment of money made or by the terms thereof payable in this State, which is not secured by mortgage, lien or pledge upon real or personal property situated or being in this State, and if so secured when such security has been rendered nugatory by the act of the defendant.
>
> "Second. In an action against a defendant not residing in this State.
>
> "Third. In an action by a resident of this State for the recovery of the value of property, where such property has been converted by a defendant without consent of the owner.
>
> "Fourth. Where a defendant has absconded, or

is about to abscond, with the intent to defraud his creditors.

"Fifth. Where a defendant conceals himself so that service of summons can not be made upon him.

"Sixth. Where a defendant is about to remove his property, or any part thereof, beyond the jurisdiction of the court, with the intent to defraud his creditors.

"Seventh. Where a defendant is about to convert his property, or any part thereof, into money, with the intent to place it beyond the reach of his creditors.

"Eighth. Where a defendant has assigned, removed, disposed of, or is about to dispose of his property, or any part thereof, with the intent to defraud his creditors.

"Ninth. Where a defendant has fraudulently or criminally contracted the debt or incurred the obligation for which suit has been commenced."

Reference to folios 129, 158, of the Record shows that the statutory provisions above referred to were utterly ignored.

No affidavit whatever was filed before the issuance of the attachment on May 12, 1893, and the only one ever filed was presented the following day for the obtention of an order of publication. The attachment was therefore void.

Furthermore, when it is desired to obtain service by publication, it is necessary that the plaintiff shall fulfill the requirements of Section 3052, providing that—

"when the person on whom the service is to be made resides out of the State, or has departed from the State, or can not, after due diligence, be found within the State, or conceals himself to avoid the service of summons, or, being a corporation, or joint stock association, can not be served as provided in Section twenty-nine (3051), and the fact shall appear by affidavit to the satisfaction of the court or a judge thereof, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or

> proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons."

In the present case affidavits were filed to the effect that the defendants had departed from the State of Nevada and could not, after due diligence, be found therein, and that service of summons upon them in said action could not be made, except by the publication thereof (folios 129 and 158). It will be observed that these affidavits do not show that a cause of action existed against the defendants in respect to whom the service was to be made, and the complaints were not made part of the affidavits, although an attempt to supply the deficiencies was apparently made by the justice, who recited, in his orders permitting publication, that "from a consideration of the complaint, it appears that a cause of action exists." We respectfully submit that the action of the justice was manifestly erroneous, and that the fact should have been made to appear to his satisfaction, in accordance with the section under consideration, by affidavit. Certainly the case, in this respect, absolutely departs from statutory directions.

We need not argue the necessity of strict compliance with statutory requirements in a case of this sort, involving, as it does, the technical features pertaining to attachment suits and to service by publication.

As showing the absolute invalidity of the proceedings herein, for the reasons above pointed out, we refer to—

Roy *vs.* Whitford, 9 Nev. 370.
Little *vs.* Currie, 5 Nev. 90.
Ricketson *vs.* Richardson, 26 Cal. 149.
Braley *vs.* Seaman, 30 Cal. 610.
Forbes *vs.* Hyde, 31 Cal. 342, 354.
Victor M. & M. Co. *vs.* Justice's Court, 18 Nev. 21, 27.

Where a justice's court acts without jurisdiction, its judgment is a nullity, not voidable but void.

12 Am & Eng. Ency. Law, 400.

Consideration of the foregoing demonstrates clearly the fact that no title whatever to the Fraction Mine was conveyed to James and George Nesbitt by reason of the above recited proceedings, and, indeed, this was apparently admitted by the trial court, and also by the Supreme Court of the State of Nevada (fols. 78, 191). It was, however, contended by both courts that although the proceedings might be insufficient to confer title, the certificates of sale and deeds were nevertheless sufficient to constitute color of title, and that the Nesbitts, having color of title, were in position to file the declarations of intention before alluded to.

We contend that, in the first place, the Nesbitts had no color of title under any proper interpretation of the law when their first declaration of intention was filed. On that date, December 26, 1893, all that they possessed were the certificates of the special deputy, showing that the sales had taken place under an execution. The title had not yet ripened because of the right of the defendants in execution to redeem their property. It still rested, therefore, in De Beque and Stevens.

The certificates were insufficient as color of title for the further reason that they did not, on their face, purport to convey title. An analogous case to this is that of a certificate of purchase at a tax sale, which for the reasons above given has been repeatedly held not to constitute color of title.

Bride *vs.* Watt, 23 Ill. 455.
Dickenson *vs.* Breeden, 30 Ill. 279, 325.
McKeighan *vs.* Hopkins, 14 Neb. 361, 363, 364.

Similarly, a pre-emption certificate and claim, while possi-

bly sufficient to maintain trespass to try title, is not until perfected title or color of title.

Buford *vs.* Bostick, 58 Texas, 63, 70.

If, therefore, the Nesbitts, never having had possession or exercised any acts of ownership over the land prior to January 1, 1894, and not having had before that time color of title to the land, filed, as they did, on December 26, 1893, a certificate of intention, surely such act upon their part must have been a mere nullity. In its filing, as will appear by reference to the Record, they acted upon their own behalf and not on the behalf of Borth or anybody having any record interest in the land (folio 175).

In view of the foregoing, what importance shall we attach to the declaration of intention filed December 22, 1894 (folio 178)? None, whatever, as it seems to us. The statute was made for the benefit of the claimant or claimants of any mining location. During the year 1894 the Nesbitts were not claimants within the meaning of this act. Their supposed title was based upon the title of Stevens and De Beque, who never filed any notice of intention in 1893, or performed any labor in that year, and whose rights had therefore lapsed. The Nesbitts themselves had performed no labor in 1893, and their only excuse for considering themselves claimants was based upon their possession of a deed executed in 1894, purporting to rest upon mining rights which had already been lost.

We understand by the term "claimant" a man who has put himself in a position to make a legal, or apparently legal, claim to land; not one who, so far as the title is concerned, appears to be a mere volunteer. A mining claimant under the United States mining laws is evidently a man who has located a mining claim or who holds under someone who had made such a location. In 1894 the Nesbitts had not located any mining claim, nor did they, so far as

the Fraction Mine was concerned, succeed to the rights of anyone who had made such a location, the original locators having failed to maintain their position. The court below manifestly erred in treating the Nesbitts as mining claimants within the meaning of the statutes of Congress, and in this respect failed, as we respectfully submit, in the proper interpretation of the mining laws of the United States.

But even if the certificate of sale and the deed to the Nesbitts had constituted color of title, we must, nevertheless, earnestly insist that such title does not meet the requirements of the present case. Color of title serves to show that the person having it is claiming title, the kind of title he claims, and also to fix the boundaries of the claim, but it does not constitute title in itself. The only advantage of having color of title is in connection with some actual possession, and in this case no such possession was had in 1893, 1894 or 1895 (until the middle of December), so far as the Record discloses, by or on behalf of the supposed Nesbitt interest.

The record of the deeds to the Nesbitt brothers did not constitute notice to anybody of the existence of a title in them, for, as we have shown, the deeds were based upon certain invalid proceedings. So far as the Record discloses, when the deeds to the Nesbitts were placed of record, the title, if any, to the Fraction Mine was outstanding in De Beque, Stevens and Borth. The recordation of deeds based upon invalid sales did not change the condition of the title. There was nothing in the Nesbitts' claim upon which they could have predicated a title, or hoped to recover in any possessory action. As against Stevens and De Beque, their title could have been instantly quieted. As against the rest of the world, they did not hold possession of the land, nor had they the ability to recover it in any imaginable suit.

If, therefore, as we insist, the title to those premises was, in the fall of 1893, in Stevens, De Beque and Borth, the

question arises, did they maintain their title in conformity with the United States statutes? No one of them filed a certificate of intention.

Nesbitt claims to have filed a certificate on behalf of Borth, and Borth so testifies. Laying aside the intrinsic improbabilities of the statement of Borth (as to which we only need refer to the fact that he says his agreement, that Nesbitt should on his behalf file a declaration of intention, was made in September, 1893, two months before the Act of Congress allowing this course was passed [folio 81]), could such a certificate have been filed by Nesbitt in Borth's interest without disclosing Borth's name? We submit, not. In no possible way, even by void proceedings, was any apparent title of record vested in the Nesbitts until the deeds to them were filed, and this did not occur until September 14, 1896. True it was that on August 18,1893, the certificates of sale were placed of record, but these certificates, as we have above shown, did not convey or purport to convey title, but expressly provided that the real estate was subject to redemption within six months; and, furthermore, an examination of the proceedings upon which they were based would have disclosed the fact that the title still remained in De Beque and Stevens.

The court below predicated the rights of the Nesbitt brothers upon the consent alleged to have been given by Borth and to which we have already alluded. The opinion is expressed that—

> "The Fraction Mine being represented by one of the locaters, A. Borth, and said Nesbitt Bros. having had said notices recorded, in pursurance of said agreement and at the instance of said Borth as well as of themselves, and under the honest belief of all three that the Nesbitt Bros. had legally acquired all the right, title, and interest of the other two locators by virtue of said judgments and sales made

> thereunder, we are of opinion that said mine had not been forfeited nor subject to relocation when the location of the Sleeper Mine was made, and therefore that the location of the Sleeper Mine was and is invalid in so far as it covers the Fraction Mining Claim." (Folio 193.)

It seems to us that the foregoing presents several propositions decidedly unusual, to say the least. The first is, virtually, that the relation of tenant in common can be created as against the world by a mere act of recognition. This involves the theory that De Beque and Stevens must have lost their title because their co-tenant recognized some other man as having succeeded to it. We do not believe that title to land can be transferred in any such vague manner.

A further implication of the opinion is that the agreement between parties, of which the public has no knowledge, can take the place of record notice required by law in order to effectuate the transfer of title. It would seem to us that such an idea would defeat all necessity for the use of public records and leave the public at the absolute mercy of any claimant to any interest in the land.

But if this agreement were had, and if it had been possible to vest title by such agreement it next appears that the Nesbitts, having no title of record, undertook in 1893 to file a notice of intention to hold the fraction Mining Claim without mentioning Borth's name in any manner whatever, nor, in fact, was Borth's name mentioned in the certificate filed in 1894. In order, therefore, to sustain any title in the Nesbitts, or in Borth, we are compelled to disregard absolutely all laws calling for notice by record. There certainly was not any notice of record to show that Borth filed such a certificate, nor was there any notice of record that such certificate was filed by his consent. Surely, to leave

the gaining or the losing of a title to parol evidence of this character would be contrary to our entire public policy.

As a matter of convenience we attach to this brief copies of the Acts of Congress called in question in this case.

In view of the foregoing we respectfully submit that the judgment of the Nevada court should be reversed.

WILLIAM M. STEWART,
JACKSON H. RALSTON,
Attorneys for Plaintiff in Error.

SUPPLEMENTAL BRIEF.

This is an action brought by James Nesbitt against William Davidson, the assignor of the plaintiff in error, to determine the right of possession of certain mining ground situated in the Ferguson mining district, Lincoln County, Nevada. The defendant below claimed the ground in question under a location regularly made by himself and one James Murphy on the first day of January, 1895, which was designated as the Sleeper mine. In pursuance of this location, possession and work on the claim, Davidson entered proceedings to obtain a patent from the United States, Murphy having sold his interest to Davidson.

While these proceedings were pending James Nesbitt brought this action, claiming title in himself. The evidence disclosed the fact that neither Nesbitt nor his brother who was interested with him had ever located, taken possession of, or worked upon the claim. His sole reliance for title was based upon certain void proceedings in a justice's court and a pretended constable's sale, all of which are conceded to be void in themselves. But by the introduction of these proceedings in evidence, Nesbitt attempted to connect himself with the location of a claim made on the 15th day of May, 1892, by Wm. De Beque, H. Stevens and A. Borth, called the Fraction claim, upon which no work was done in the years 1893 and 1894, and which claim had been forfeited and the land was subject to relocation in January, 1895, when Davidson and Murphy made their location.

Notwithstanding that Nesbitt was without title or possession, he attempted to acquire title under the provisions of two Acts of Congress, which are set out in the Appendix, each of which acts authorizes a claimant of a mining claim to dispense with assessment work, provided he files a notice in good faith that he intends to hold and work his

claim. The Nesbitt brothers on the 27th day of December, 1893, filed a notice that they intended to work eight claims, giving a list of names in which was included the Fraction claim, and in the following year recorded a similar notice. The names of none of the locators of the Fraction claim appeared in either notice.

It is true there is some loose testimony tending to show that Borth, one of the locators of the Fraction claim, knew something about what the Nesbitts were doing and consented to their action, but it appears that the conversation between the Nesbitts and Borth occurred before the passage of the first Act of Congress authorizing the suspension of annual work on claims. However that may be, any secret understanding which they may have had can not affect the rights of the plaintiff in error. Borth did not convey his interest or any interest to the plaintiff below, nor did he perform any act that would confer title on said plaintiff. The district court received in evidence the pretended certificate of sale and deed of the constable on the express ground that it would give the plaintiff a colorable title and relieve him from the position of a voluntary intruder. And the Supreme Court of Nevada on appeal took the same position, and said:

> "The vital question in this case is whether the said notices the Nesbitt Bros. caused to be recorded of their intention to hold and work said mine had the legal effect of saving the mine from being subject to relocation for any period of time? In determining this question, it is not necessary to consider what legal value said certificates of sale and deeds may have, if any, except as evidence tending to show the good faith of the Nesbitt Bros. and their co-claimant, A. Borth, in all that they did with reference to said mine" (folio 191).

The court erred in supposing the question under consideration was a question of good faith. It was simply a ques-

tion of title, nothing more, nothing less, and it is immaterial whether or not the Nesbitt brothers acted in good faith, so long as they produced nothing in evidence showing a title to the claim in question.

As for the good faith of Borth in all that he did there need be no question, for he simply did nothing. There is not a particle of evidence tending to show title in the plaintiff or that Borth ever did anything to preserve the title he acquired to the Fraction claim in 1892; on the contrary, the evidence shows that so far as he was concerned he abandoned the claim. Notwithstanding this, judgment was rendered for Nesbitt. Upon what ground the court below entered a judgment for Nesbitt, which the Supreme Court of Nevada sustained, it is difficult to imagine. The attempt was made to acquire title under the Acts of Congress suspending work on mining claims through the notices of the Nesbitts that they intended to work the Fraction claim. Such a construction of the Acts of Congress is certainly erroneous, because the Nesbitts by those notices could perpetuate no claim which they did not have. They were not claimants within the meaning of the statutes. Even if they did save the claim from relocation and perpetuate the title in the locators of the Fraction claim, it would not alter the case because nobody except an adverse claimant to the land, or the United States, could question the location and possession of the Sleeper claim by the plaintiff in error and its grantors. The locators of the Fraction claim did not protest but remained silent, and under section 2325 of the Revised Statutes of the United States their claim was barred.

Nesbitt was not an adverse claimant with a better title or any title to the ground in question, and judgment should have been rendered against him.

Whatever claim the defendant in error may have to the mine in question, according to the position of the court below, grows out of the construction of the two Acts of

Congress of November 3, 1893, and July 18, 1894, and consequently a Federal question is presented conferring jurisdiction upon this honorable court.

Miller *vs.* Nicholls, 4 Wheaton, 311.
Railroad Co. *vs.* Maryland, 20 Wallace, 643.
State of Minnesota *vs.* Bachelder, 1 Wallace, 109.
Kaukauna Water Power Co. *vs.* Green Bay & Miss. Canal Co. 142 U. S. 254.

WILLIAM M. STEWART,
JACKSON H. RALSTON,
Attorneys for Plaintiff in Error.

APPENDIX.

AN ACT to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, relating to mining claims. (28 Stats. at L. 6.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-three so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-three: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they, in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

This act shall take effect from and after its passage.

Approved Nov. 3, 1893.

AN ACT to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims. (28 Stats. at L. 114.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the

provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-four, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-four: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed, on or before December thirty-first, eighteen hundred and ninety-four, a notice that he or they in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

SEC. 2. That this act shall take effect from and after its passage.

Approved July 18, 1894.